SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1329 98

ELI GURMAN,

Petitioner,

vs.

FREDERICK ILLG, AND CHESTER BOWLES, ADMINISTRATOR FOR THE OFFICE OF PRICE ADMINISTRATION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT AND BRIEF IN SUPPORT THEREOF

GEORGE E. BEERS,
WILLIAM L. BEERS,
Counsel for Petitioner.

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CASES:

CONSTITUTION OF THE UNITED STATES:

SUPREME COURT OF THE UNITED STATES

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No. 1329

ELI GURMAN,

vs. *Petitioner,*

FREDERICK ILLG,

AND *Respondent,*

CHESTER BOWLES, ADMINISTRATOR FOR THE OFFICE OF PRICE ADMINISTRATION, *Intervenor*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

MAY IT PLEASE THE COURT:

The petition of Eli Gurman respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

This is an action originally brought to the Court of Common Pleas for the County of New Haven, State of Connecticut, by the respondent against the petitioner under Section 205(e) of the Emergency Price Control Act of 1942, approved January 30, 1942, C 26 Title II, Sec. 205, 56 Stat. 33. (See Third Count of Complaint R. 3, 4.)

The petitioner operates a rooming house in New Haven, Connecticut. The respondent was a roomer for a period of thirty-eight weeks under an agreement made before the beginning of the period and running indefinitely from week to week. (Find. 2, 4, R. 16).

The trial court found that the respondent paid $5.00 a week for the room, while the highest rate permitted under the rent control regulations was $4.00 a week. This resulted in an overcharge of $1.00 a week, or a total of $38.00. (Find. 3, 7, 20, R. 16, 18).

The Court concluded that under Section 205(e) of the Emergency Price Control Act of 1942 the respondent was entitled to recover a penalty of $50.00 for each of the thirty-eight weeks, (Find. II-1 R. 18) and rendered judgment for $1900.00 and costs (R. 11).

This judgment was affirmed by the Supreme Court of Errors (R. 23).

The petitioner contends that the damages should have been limited to three times the overcharge—that is, three times $38.00 or $114.00—instead of $1900.00.

B

Statement as to Jurisdiction

This case involves the construction of an Act of Congress, viz. Section 205(e) of the Emergency Price Control Act of 1942. The petitioner contends that the Supreme Court of Errors of the State of Connecticut has erred in its construction of the Act and that the construction adopted by it resulted in a violation of the Fifth and Eighth Amendments to the Constitution of the United States. Accordingly, the case is within the jurisdiction of this Court under U. S. C. A. Title 28, Section 344-b.

The Federal questions have been raised and considered throughout the entire proceedings. The Complaint, Third

Count, (R. 3, 4) counts upon the Emergency Price Control Act of 1942. The Answer in the Second Defense to the Third Count (R. 9) states the petitioner's contention as to the proper construction of the Act.

The trial court has stated the petitioner's claims of law made at the trial as to the construction of the Act and as to the constitutionality of the construction for which the respondent contended, (Pars. 3-6, R. 19). The petitioner's assignment of errors to the Supreme Court of Errors claims specifically that the trial court erred in the overruling of these claims of law and in the contrary conclusions of the court. (Pars. 1 and 2, R. 20).

The Supreme Court of Errors in its opinion dealt with these claims and decided them adversely to the petitioner (R. 22). This is the highest court of Connecticut.

C

Questions Presented

Section 205(e) of the Emergency Price Control Act of 1942 reads in part as follows:

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be." Approved January 30, 1942, C 26 Title II Sec. 205, 56 Stat. 33.

The questions presented here are:

1. Does an overcharge in the renting of a room for thirty-eight weeks under an agreement running indefinitely from week to week constitute one continuous violation or thirty-eight separate violations?

2. Does the construction put upon the section and affirmed by the Supreme Court of Errors resulting in an award of $1900.00 for an overcharge of $38.00 violate the Fifth and Eighth Amendments to the Constitution of the United States?

3. Is not the amount which can be recovered in "an action" limited to either a single award of $50.00 or to treble the amount of the overcharge, whichever is greater?

4. Is the amendment of June 30, 1944 applicable?

D

Reasons Relied On for the Allowance of the Writ

It is submitted that in construing Section 205(e) of the Emergency Price Control Act of 1942 the Supreme Court of Errors has decided a Federal question of substance not heretofore determined by this Court and upon which the decisions of the lower Federal courts and courts of various States are in conflict.

That the question is substantial appears from the fact that a construction has been placed upon the statute under which one sustaining an injury of $38.00 is to be compensated fifty-fold, viz. by an award of $1900.00, and under such construction cases may well arise where the amounts are much larger and the disproportion far greater.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of

Errors of the State of Connecticut, commanding that court to certify and to send to this Court for its review and determination on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case called and entitled on its docket No. 2633, James K. Walsh et als. [Frederick Illg, sole remaining plaintiff-appellee] against Eli Gurman [defendant-appellant] and that the judgment of the Supreme Court of Errors of the State of Connecticut may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ELI GURMAN,
By GEORGE E. BEERS,
WILLIAM L. BEERS.
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1329

ELI GURMAN,

Petitioner,

vs.

FREDERICK ILLG, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion of the Supreme Court of Errors of the State of Connecticut, which disposed of this and a companion case, has not yet been officially reported. It is printed in the record (R. 22).

II

Jurisdiction

(1) The jurisdiction of this Court is invoked under Title 28, U. S. C. A. Section 344 (b) The specific claims as to the jurisdiction of this Court are set out in the ac-

companying petition under the heading "B" and in the interest of brevity they are not repeated here.

(2) The judgment of the Supreme Court of Errors of the State of Connecticut sought to be reviewed was rendered on May 2, 1945 (R. 28).

(3) This judgment affirms the judgment of the Court of Common Pleas for the County of New Haven (R. 11) in favor of the respondent (plaintiff below) and against the petitioner (defendant below).

III

Statement of the Case

The essential facts of the case are given under the heading "A" in the accompanying petition and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument which follows:

IV

Specification of Errors

It is respectfully submitted that the Supreme Court of Errors of the State of Connecticut erred in finding and holding

1. That under Section 205(e) of the Emergency Price Control Act of 1942 an overcharge in the weekly rental of a room for 38 weeks under an agreement running indefinitely from week to week constituted 38 separate violations, creating liability for damages in the amount of 38 times $50, viz. $1900.00.

2. In finding and holding that a construction of the Emergency Price Control Act of 1942, which results in an award

of $1900 for overcharges totaling only $38 in a continuous transaction does not violate the fifth and eighth amendments to the Constitution of the United States.

3. In holding that the plaintiff can recover in one action 38 times $50, instead of limiting recovery in "an action" to a single award of $50 or treble the overcharge, whichever is greater.

4. That the amendment of June 30, 1944, did not apply.

V

Summary of Argument

We develop the argument under the following heads:

A

The "commodity" sold in this case was the right to the occupancy of a room in a rooming house. The fact that the consideration was paid in weekly installments did not transform one selling into many sellings.

B

The award of so large a sum for so small an injury constitutes the taking of property without just compensation in violation of the Fifth Amendment to the Constitution of the United States and the imposition of an excessive fine in violation of the Eighth Amendment. If the Supreme Court of Errors has correctly construed the Emergency Price Control Act of 1942, then the Act, to that extent and under these circumstances, is unconstitutional.

C

Section 205(e) of the Emergency Price Control Act of 1942 provides for the bringing of "an action" for $50 or treble the amount of the overcharge, whichever is greater.

Whatever may be the result when separate actions are brought for separate violations, the award in one action must be limited to a single award of $50 or to treble the overcharge, whichever is greater.

VI

One Continuous Violation, Not Thirty-eight Separate Violations

The "commodity" sold in this case was the right to the occupancy of a room in a rooming house. The fact that the consideration was paid in weekly installments did not transform one selling into many sellings.

The Object of the Fifty Dollar Provision.

The reason for the $50 provision is obvious. As most of the infractions would involve only very small amounts, the fifty dollar provision was included to secure energetic action. It could never have been intended as a means of substantial unjust enrichment. The amounts had to be comparatively small to avoid an unconstitutional taking of one man's property for another. The reasons and limitations in such legislation are admirably stated in *Fisher* v. *N. Y. C. & H. R. R.*, 46 N. Y. 644, 647.

Meaning of the Phrase, "Payment or Receipt of Rent."

In an earlier decision the court below had dealt with a somewhat different situation. (*Lapinski* v. *Copacino*, 131 Conn. 119.) In that case there was a rental under a so-called month-to-month tenancy at so much per month (p. 129). As to this tenancy the court said that "by our law under such tenancy each month's occupancy constitutes a separate leasing. General Statutes § 5021," (p. 131).

In such a tenancy, as the period is fixed, there is what is technically an estate for years, the word "years" simply

denoting a fixed period which may be "ever so short or long." *1 Revision of Swift's Digest,* side page 87.

By the early common law, which was also the early law of Connecticut, there were three estates less than free hold: estates for years; estates by sufferance; and estates at will. *1 Revision of Swift's Digest,* side pages 87-92.

What was known as an estate from year to year was an outgrowth by judicial construction of the estate at will. *4 Kent's Commentaries,* side page 112.

"It might be implied from the occupancy by one of the land of another, and the payment and acceptance of rent yearly or at aliquot parts of a year * * *" *Robinson's Elementary Law,* Sec. 96, p. 56.

If, therefore, the occupancy in the case at bar were an estate at all—instead of, as it was, a mere occupancy under a license—it would be an estate from year to year, a continuous thing, and not a series of independent estates as in *Lapinski* v. *Copacino,* 131 Conn. 119.

It is not material whether this case involves a new error or repeats the error of the earlier case, for the solution is to be found in the intent of the Congress expressed in the Act and not in any peculiarity of Connecticut law. The Emergency Price Control Act of 1942 certainly does not show *"an intention to permit its meaning to be varied by state law." Estate of Putnam* v. *Commissioner of Internal Revenue,* 89 L. Ed. (U. S.) Adv. Ops. 734, 735 (decided March 26, 1945).

In legislation of this kind just as in the Federal revenue laws "Congress establishes its own criteria * * *. Exemption from the Federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York according to the differing views of the state courts" *Lyeth* v. *Hoey,* 305 U. S. 188, 194.

Surely it was not the intent of the Congress to express the idea that the "payment or receipt of rent" indicates the physical handing over of the money. If, for instance, in the case of an apartment rented for thirty dollars a month, when the tenant goes to work in the morning he hands the landlord fifty cents, and when he comes back from work hands him fifty cents more, and so on through the month, it could not be said that there had been sixty payments, or that the unfortunate landlord was to be mulcted in the sum of three thousand dollars for one month, or thirty-six thousand dollars for a year.

What must be the real meaning of the payment and receipt is stated with wonderful clarity in *McCowen* v. *Dumont*, 54 Fed. Supp. 749, 751, as follows:

> "When the 'commodity' is the right to occupy a given habitation, the 'selling' of the commodity would seem to be the agreement whereby the right to occupancy is given. The fact that the consideration is to be paid in installments, or weekly, or monthly, logically would not transform one selling into many sellings."

It will be noted that the only authority under the federal law for including rentals at all is as one form of selling a commodity.

What Might Happen Under the Rule Adopted Below.

There can be no difference in principle between a period of a week and one of a day. Suppose a rooming house or hotel charges $2.25 a day when it should charge $2. The overcharge for the year would amount to $91.25. The recovery would be $18,250.

If a great hotel, say of 3,000 rooms, makes a specialty of permanent occupancies and even 100 rooms are continuously occupied by the same people, we have the neat sum which might have to be paid of $1,825,000. It might

well be, however, that one-third of the rooms, or 1,000 in all, will be likewise occupied. This would make the recovery $18,250,000. If all were likewise occupied we reach $54,750,000.

Rooms are often taken for a part of the twenty-four hours, to dress in, for conferences, or the like. In these times of shortage of housing accommodations the flop house flourishes, and it is quite possible to have three different people occupying the one room consecutively. It is not an unnatural arrangement, therefore, to have rooms rented not by the day but by the hour.

If you assume that, we reach in the case of the hotel last referred to, the modest figure of over a billion dollars.

A decent respect for the sanity of the Congress must lead us to some construction consistent with elementary justice and common sense.

These Results Not All Fanciful.

Cases calling for judgments of a billion dollars are not likely to be presented.

Situations are, however, likely to arise where the discrepancies are not only as striking as those in the cases at bar, but even much more so.

In *Peters* v. *Felber,* 152 Pac. (2d) 42, 44, an intermediate appellate court of California drawing upon its own actual experience uses this language:

> "This is not a fanciful speculation. We have one appeal pending before us where a multiple of fifty dollar penalties is sought because of a succession of weekly rents which exceeded the ceiling price by twenty-five cents each. In another action now on appeal the plaintiff pleads twenty-two purchases in which he was overcharged a total of thirty-four cents and prays for twenty-two fifty dollar penalties—a total of $1,100.
>
> "To interpret the section so as to hold out so great rewards for so minor overcharges would serve to foster

> in buyers a desire to promote price violations rather than to put a stop to them, with the result that the section would operate to defeat rather than further its purpose."

In *Ward* v. *Bochino,* 181 Misc. 355 46 N. Y. Supp (2d) 54, 58, a New York Supreme Court Case, there was a weekly overcharge of fifty cents for thirty-one weeks—$15.50 in all. The court in setting aside a directed verdict of $1,550 notes that the plaintiff by waiting for the whole year might have sued for $2,600, and adds, if it were a daily rental, then the penalty could be fifty times $365, of $18,250 for one year."

A Construction which Leads to Absurd Results Cannot Be Sound.

A law so drastic and savage as this should certainly not be extended in favor of one seeking to get an unearned increment. In this connection it must be remembered that the terms of the law are general and apply regardless of blame or lack of blame. *Bowles* v. *Amer. Stores,* 139, Fed. (2) 377.

This was expressed by the Chief Justice in *Haggar Co.* v. *Helverton,* 308 U. S. 389, 394; 84 Law Ed. 340, 344, as follows:

> "A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purposes."

VII

The Construction Adopted Below Makes a Part of the Act Unconstitutional

The award of so large a sum for so small an injury constitutes the taking of property without just compensation in violation of the Fifth Amendment to the Constitution of

the United States and the imposition of an excessive fine in violation of the Eighth Amendment. If the Supreme Court of Errors has correctly construed the Emergency Price Control Act of 1942, then the Act, to that extent and under these circumstances, is unconstitutional.

The question of constitutionality is important in three ways.

First—If a certain construction would lead to unconstitutional results that is a convincing argument against such construction.

Second. The Act or a part of it may be unconstitutional and void.

Third. There may be an unconstitutional application of the Act, as, for instance, where it is made the instrument of extortion.

Where one man's property is taken away from him without due process of law or an excessive fine and penalty imposed, there is a violation of the Constitution of the United States, particularly of the 5th and the 8th amendments. *16 Corpus Juris Secundum,* pp. 643 U. S. C. A. Constitution 5th Am. p. 182, note 15.

Certainly an Act which said that if a man did not meet a $100 note the payee could recover $100,000 could not stand, and the construction adopted below is just as drastic as that would be.

These judgments are out of all proportion, not only to the overcharges, but also to the requirements of an effective prosecution of the litigation. They constitute in this particular case a taking of property without due process of law.

This is a civil suit for damages for the benefit of an individual and criminal cases upholding large fines, particularly against corporations, are not in point. This Act has none of the safeguards which exist in the criminal law. We

do not have here the discretion in prosecuting authorities and trial judges to make the penalty fit the crime. The Congress may well provide wide limits for offenses which may be great or small. It can hardly have intended an inflexible maximum applicable to all alike. All of this shows that the Act was misconstrued by the Court.

VIII

Only One Penalty in One Action

Section 205(e) of the Emergency Price Control Act of 1942 provides for the bringing of "an action" for $50 or treble the amount of the overcharge, whichever is greater. Whatever may be the result when separate actions are brought for separate violations, the award in one action must be limited to a single award of $50 or to treble the overcharge, whichever is greater.

The statute, as noted, provided that if there was an overcharge the person paying the money "may bring an action" either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price.

It will be observed that it refers to the bringing of an "action for $50 * * *" and says nothing of a part of an action or a cause of action within an action.

IX

Conflict of Authority

The opinion below (R. 27) cites cases reaching the same result. Other courts agree with the position we take. *Peters* v. *Felber*, 152 Pac. (2d) p. 42 a California case; *Gordon* v. *Hochberg*, 49 N. Y. Supp. (2d) 957, 182 Misc. 117, a case in the appellate term of the New York Supreme Court; *Aronwald* v. *Sperber*, 49 N. Y. Supp. (2nd) 257 (merchandise); *Ward* v. *Bochino*, 46 N. Y. Supp. (2d) 54, 57, 181 Misc. 355, 50 N. Y. Supp. (2nd) 336 (App. Div.);

Link v. *Kallaos*, 56 Fed. Supp. 304; *Everly* v. *Zepp*, 57 Fed. Supp. 303; *Simmons* v. *Charbonier*, 56 Fed. Supp. 512, and particularly *McCowen* v. *Dumont*, 54 Fed. Supp. 749.

The law should operate uniformly throughout the country. Only this Court can resolve the conflict and point the way for all to follow.

X

The 1944 Amendment

On June 30, 1944, the Stabilization Extension Act of 1944 (Public Law No. 383, 78th Congress, Second Session, Chap. 325) became effective. The court did not apply it to this case, although it was pending on June 30, 1944.

Conclusion

The amendment contained in the Stabilization Extension Act of 1944, c325, Title I, Sec. 108, 58 Stat. 640, did not become effective until June 30, 1944. There must be a vast number of cases, both those now pending and those which may hereafter be brought under the law in its original form. The courts of various states and the lower Federal Courts have divided sharply on the questions presented in this case.

Even if this were the only case, the greatly disproportionate penalty imposed upon the petitioner amply justifies his resort to this Court to correct a grievous error in the construction and application of an Act of the Congress.

We respectfully submit that a petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE E. BEERS,
WILLIAM L. BEERS,
Counsel for Petitioner,
205 Church Street,
New Haven 2, Connecticut.

NOTE: The companion case in the Supreme Court of Errors decided with the same opinion (R. 22) is being held by the Court below to await the decision of this case, as appears from the following memorandum:

"ROBERT E. KINIRY

vs.

ELI GURMAN

State of Connecticut, New Haven County

Supreme Court of Errors, May 17, 1945

Memorandum In re Motion to Reargue

Per CURIAM:

In view of the fact that counsel for the defendant, also the defendant in the companion case of *Walsh v. Gurman*, propose to apply for a writ of certiorari to the Supreme Court of the United States in that case, action upon this motion will be deferred until the final determination of that application, and, if it is granted, until the final determination of the case of *Walsh v. Gurman* in the Supreme Court of the United States.

Certified:

MALTBIE,

Chief Justice."

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 98

ELI GURMAN, PETITIONER

v.

FREDERICK ILLG, AND CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF FOR THE PRICE ADMINISTRATOR IN OPPOSITION

OPINIONS BELOW

The memoranda of the Court of Common Pleas for New Haven County, Connecticut (R. 11, 13–15) are not reported. The opinion of the Supreme Court of Errors of the State of Connecticut (R. 22–27) has not yet been reported.

JURISDICTION

The judgment of the Supreme Court of Errors of the State of Connecticut, Third Judicial District, was entered on May 2, 1945 (R. 28). The petition for a writ of certiorari was filed on May

28, 1945. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 205 (e) of the Emergency Price Control Act of 1942, before its amendment, entitled a tenant, in a single action, to recover from his landlord not less than $50 for each weekly payment of rent in excess of the legal maximum.

2. Whether, if construed to permit such recovery, the Section is constitutional.

3. Whether the amendment to Section 205 (e), effected by the Stabilization Extension Act of 1944, applies to this suit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out in the Appendix, *infra*, pp. 12–15.

STATEMENT

The facts, as found by the judge of the Court of Common Pleas for New Haven County (R. 15–18) are, in substance, as follows:

Petitioner rented a room in the New Haven Defense Rental Area to the respondent Illg, on a week to week basis and for an indefinite period, at a weekly rental of $5.00 (R. 16). During the period from August 1, 1942, to April 24, 1943,

inclusive, petitioner demanded and received from Illg thirty-eight separate payments of $5.00 each as weekly rental for the room (R. 17). Under the Rent Regulation for Hotels and Rooming Houses (R. 6–7, 8 F. R. 14663), issued under Section 2b of the Emergency Price Control Act, the maximum rent for the room was $4.00, that being the highest amount for which the room was rented during the thirty days ending April 1, 1941 (R. 16).

Illg brought this suit in the Court of Common Pleas for New Haven County, Connecticut, to recover damages from the petitioner under Section 205 (e) of the Emergency Price Control Act of 1942. Pursuant to Section 205 (d) of the Act, the Price Administrator was permitted to intervene in the action (R. 8). The Court of Common Pleas granted judgment in favor of Illg against petitioner for $1,900, this being $50 for each of the thirty-eight payments (R. 11), and the Supreme Court of Errors affirmed the judgment (R. 28).

ARGUMENT

The Supreme Court of Errors held that Section 205 (e) entitled a tenant to recover from his landlord not less than $50.00 for each payment of rent in excess of the legal maximum, that the Section was constitutional, and that the amendment to the Section effected by the Stabilization Extension Act of 1944 was not retroactive. The decision is correct and is in accord with the deci-

sions of all federal circuit courts of appeals and all state courts of last resort which have passed on the matter.

1. The Court below correctly construed Section 205 (e). The first sentence of Section 205 (e), as it read before its amendment on June 30, 1944, provided (see Appendix, *infra*, p. 12):

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court.

The second sentence read:

> For the purpose of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be.

The Section, therefore, insofar as rents are concerned, is to be construed as though it read as follows:

> If any person *receiving rent* for defense-area housing accommodations violates a regulation * * * etc., the person who pays the rent for such defense-area housing

> accommodations may bring an action for $50 or for treble the amount by which the consideration exceeded the applicable maximum rent plus reasonable attorney's fees and costs as determined by the court.

So read, Section 205 (e) clearly gives to a tenant a cause of action for not less than $50 for each payment of rent in excess of the legal maximum. *Lambur* v. *Yates*, 148 F. 2d 137 (C. C. A. 8); *Thierry* v. *Gilbert*, 147 F. 2d 603 (C. C. A. 1); *Desper* v. *Warner Holding Co.*, Supreme Court of Minnesota, decided May 4, 1945;[1] *Regan* v. *Kroger Grocery & Baking Co.*, 54 N. E. 2d 210 (Sup. Ct. Ill.).

Where the rent is paid at intervals for stated periods of time, it is wholly immaterial whether the premises for which the rent is paid be regarded as having been let but once for one entire term, or as having been let successively for each of the periods for which the rent is paid, because it is the receipt of rent in violation of a regulation and not the letting of the premises that gives

[1] In the *Desper* case, the Supreme Court of Minnesota said:

> The law is well established that a tenant charged in excess of the maximum permitted under the regulation is entitled to a separate cause of action and claim for each monthly violation of such regulation where the lease calls for monthly payments of rentals in advance, notwithstanding the fact that he rents under a yearly lease. It is true there are a few authorities to the contrary on this point, but the majority of courts have held in accordance with the foregoing.

A copy of the opinion in this case has been lodged with the Clerk of this Court.

rise to the cause of action. In the case of commodities the basis of the cause of action is different. There it is the sale of a commodity in violation of a regulation and not the receipt of the price that gives rise to the cause of action. This distinction is made not only by Section 205 (e) but also by Section 4 (a) of the Act. That Section makes it unlawful "*to sell or deliver any commodity* * * * or *to demand or receive any rent* for any defense-area housing accommodations * * * in violation of any regulation * * *" [italics supplied]. The two Sections are in *pari materia* and should be read together. When they are so read, there can be no doubt that each receipt of rent in excess of the legal maximum gives rise to a separate cause of action. Since the regulation establishes a ceiling on the basis of weekly rentals (R. 7), each payment is as distinct from the other as the theft of mail from separate bags in a post office, *Ebeling* v. *Morgan*, 237 U. S. 625, or the sale on consecutive days of narcotics by the same seller to the same purchaser. *Blockburger* v. *United States*, 284 U. S. 299.

Nor is it at all material whether the tenant brings a separate action for each overcharge or one action for several overcharges. The expression "may bring an action * * * for $50," in Section 205 (e), operates to fix the minimum amount which a tenant or consumer may recover on any one cause of action, and not the maximum amount

of liquidated damages which he may recover in any one suit in which more than one cause of action is stated. It would be absurd to construe this provision as permitting a recovery of more than $50, as liquidated damages, in a multiplicity of suits, but not permitting such recovery in one suit based on the same series of overcharges. That such a construction was not anticipated is clearly shown by the legislative history of the amendment to Section 205 (e), effected by the Stabilization Extension Act of 1944 (Appendix, *infra*, pp. 13–14).[2] Explaining the amendment and the reasons for its adoption, the Senate Committee on Banking and Currency said (S. Rep. No. 922, 78th Cong., 2d Sess. pp. 13–14):

> Section 108 of the bill amends subsection (e) of section 205 of the Emergency Price Control Act. * * * For example, if a roomer who pays his rent by the day is overcharged 50 cents a day for 10 days, he is entitled under the present law to recover $500 from his landlord even though the aggregate amount of the overcharges is only $5.
>
> This bill amends the present law with respect to the amount of damages which may be recovered in actions under this subsection. With respect to the $50 minimum, it is provided that the purchaser may recover only

[2] Subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject. *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309.

> one $50 for all of the overcharges which he has paid to a given seller prior to the bringing of the suit.

Similar statements were made by the House Committee on Banking and Currency (H. Rep. No. 1593, 78th Cong., 2d Sess. p. 8) and in the Conference Report (H. Rep. No. 1698, 78th Cong. 2d Sess. p. 23).

2. In allowing a separate recovery of $50 for each overcharge, Section 205 (e) does not violate any right guaranteed by either the Fifth or Eighth Amendments (Appendix, *infra*, p. 12). The imposition of a separate liability for each repetition of a wrongful act is not uncommon. Compare, *United States* ex rel. *Marcus* v. *Hess*, 317 U. S. 537; *Ebeling* v. *Morgan*, 237 U. S. 625; *Blockburger* v. *United States*, 284 U. S. 299. Concededly, in certain circumstances, the requirements of due process forbid the imposition of cumulative liabilities for the violation of a statute or administrative order pending an attempt to test the validity of the statute or order in the courts and for a reasonable time thereafter. *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 310. But that principle has no application where administrative relief has not been sought and where, as here (*Yakus* v. *United States*, 321 U. S. 414), an adequate procedure for judicial review is provided and the defendant fails to avail himself of it. *St. Louis I. Mt. & So. Ry Co.* v. *Williams*, 251 U. S. 63, 65;

Wadley Southern Ry. Co. v. *Georgia,* 235 U. S. 651; *Gulf C. etc. Ry. Co.* v. *Texas,* 246 U. S. 58.

It may also be conceded that a statute imposing penalties may be unconstitutional under the Eighth Amendment if the penalties are so disproportionate to the offense as to be excessive. But in cases such as this, the validity of the statute is not to be tested by contrasting the penalty with the amount of the overcharge but by the public interest in having the statute obeyed and the relation of the penalty to that object. *St. Louis I. Mt. & So. Ry.* v. *Williams,* 251 U. S. 63, 67. When tested by that standard, the liability imposed by Section 205 (e), even if it could be classed as a fine within the meaning of the Eighth Amendment, cannot be said to be excessive. Compare, *Gulf C. etc. Ry. Co.* v. *Texas,* 246 U. S. 58, where this Court upheld a fine of $22,400 for 224 successive failures of a railroad to stop its trains at a county seat as required by an order of the Texas Railway Commission. Petitioner labors the point that the liability imposed by Section 205 (e) may run into astronomical figures. A sufficient answer to that argument, based as it is on pure speculation and conjecture, is that actual experience has shown it to be without foundation. The time within which a suit might be brought for $50 for each overcharge expired on June 30, 1945, and although Section 205 (d) of the Act requires all courts to notify the Price Administrator of any and all ac-

tions brought under the Act, no action has come to the attention of the Price Administrator in which a recovery has been allowed (based solely on the $50 minimum provision of the statute) for an amount in excess of the fine which might properly be imposed for a single violation under the criminal provisions of Section 205 (b) of the Act. Furthermore, while the good faith of the defendant was not a defense to an action brought under Section 205 (e) as it read before its amendment, the legislative history of the Act shows that Congress intended that the bad faith of the plaintiff should bar a recovery.[3] The Section could not, therefore, become an instrument of abuse.

3. The amendments to Section 205 (e), effected by the Stabilization Extension Act of 1944, clearly do not apply to this action. Section 108 (c) (Appendix, *infra*, p. 15) of the Stabilization Extension Act expressly provides that the amendments, insofar as actions brought by consumers or tenants are concerned, should apply only with respect to violations thereafter occurring. *Thierry* v. *Gilbert*, 147 F. 2d 603, 605 (C. C. A. 1).

4. There is no conflict between the decision of the court below and the decision of any other state court of last resort, or the decision of any federal circuit court of appeals. There are a number of federal district court decisions, as well as a number of lower state court decisions, which

[3] See S. Rep. No. 931, 77th Cong., 2d Sess., pp. 9–10.

are in conflict with the decision sought to be reviewed (Br. 16–17), but they were all decided before any federal circuit court of appeals had passed upon the matter. See cases cited *supra*, p. 5.

CONCLUSION

The decision of the court below is plainly right and no reason exists which would justify its being reviewed by this court.

Respectfully submitted,

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JULY 1945.

APPENDIX

The Fifth Amendment to the Constitution of the United States provides, in relevant part, as follows:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

The Eighth Amendment to the Constitution of the United States provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Section 205 (e) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. (Supp. III) 901, *et seq.*, provides as follows:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maxi-

mum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

This Section was amended by Section 108 (b) of the Stabilization Extension Act of 1944, 58 Stat. 640, 50 U. S. C. A. App. 925 (e), which provides:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be

the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

Section 108 (c) of the Stabilization Extension Act of 1944 provides that:

> The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

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